

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KRAFT HEINZ FOODS COMPANY
formerly known as H.J. HEINZ COMPANY,

Plaintiff

vs.

BOULDER BRANDS USA, INC.
formerly known as GFA BRANDS, INC.,

Defendant.

Civil Action No. 2:15-cv-681-LPL

PLAINTIFF'S RESPONSE TO
DEFENDANTS MOTION FOR
LEAVE TO FILE UNDER SEAL

Plaintiff Kraft Heinz Foods Company, formerly known as H.J. Heinz Company ("Heinz") hereby files its response to Defendant Boulder Brands USA, Inc's ("Defendant") Motion for Leave to File Under Seal ("Pending Motion"). In responding to the Pending Motion, Heinz states as follows:

1. Defendant has requested leave to file certain discovery documents with the court under seal in connection with its intended opposition to Heinz's motion to seek leave to amend the complaint ("Motion to Amend").

2. Defendant did not advise Heinz of its intent to file the Pending Motion nor seek Heinz's consent to file the Pending Motion prior to filing.

3. Having reviewed the Pending Motion and the listing of documents and information sought to be filed by Defendant, Heinz notes that such documents and information are not material to the analysis of Heinz's Motion to Amend. *See* Dkt. Nos. 55 and 56. As thoroughly explained in the Motion to Amend, leave to amend a Complaint should be "freely given," and is analyzed by considering: (a) whether the amendment would create undue prejudice to the opposing party; or (b) whether the failure to seek amendment sooner was in bad

faith, caused undue delay to the proceedings or had a dilatory motive such that the amendment would be unjust. *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978); *see also* Dkt Nos. 55 and 56.

4. The documents and information that Defendant wishes to submit with its opposition to the Motion to Amend speak to the substantive issue for trial, *i.e.* whether Defendant's activities as of the filing date of the Boulder Applications in 2009 demonstrate an objection plan of action and constitute a *bona fide* intent to use the mark in commerce. *See* Pending Motion; Dkt. Nos. 55 and 56. Indeed, Defendant's intended submission of the documents and information listed in the Pending Motion is further support for Heinz's position in its Motion to Amend that discovery on this issue has been fully completed and that Defendant will not be prejudiced by the inclusion of the claim at a trial which has not yet been set by the Court.

5. Nonetheless, while Heinz does not believe the listing information and documents are material to the analysis of the Motion to Amend, Heinz does not object to the Pending Motion.

6. Heinz does not intend that its lack of opposition to the Pending Motion be perceived as concurrence that Defendant's confidentiality designations of such documents and information are appropriate or proper under the applicable Protective Order.

Dated: September 21, 2016

Respectfully submitted,

s/ Brian S. Sullivan

Karen K. Gaunt (Oh. Bar No. 0068418)
April L. Besl (Oh. Bar No. 0082542)
Brian S. Sullivan (Oh. Bar No. 0040219)
B. Joseph Schaeff (Oh. Bar. No. 0013852)
DINSMORE & SHOHL LLP
255 E. Fifth Street, Suite 1900
Cincinnati, OH 45202
Phone: (513) 977-8200
Fax: (513) 977-8141
Email: karen.gaunt@dinsmore.com
april.besl@dinsmore.com
brian.sullivan@dinsmore.com
joseph.schaeff@dinsmore.com

Ansley S. Westbrook, II, Esq.
P.A. ID No. 77732
DINSMORE & SHOHL LLP
Firm No. 732
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburgh, PA 15219
Phone: (412) 281-5000
Fax: (412) 281-5055
Email: ansley.westbrook@dinsmore.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed, is available for viewing and downloading from the ECF system, and was sent to all counsel of record on September 21, 2016

DINSMORE & SHOHL LLP

s/ Brian S. Sullivan

Brian S. Sullivan

DINSMORE & SHOHL LLP

255 East Fifth Street, Suite 1900

Cincinnati, Ohio 45202

(513) 977-8200

(513) 977-8141-fax

brian.sullivan@dinsmore.com

Attorney for Plaintiff

Kraft Heinz Foods Company